Supreme Court, U.S.
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No. 02-478

IN THE

Supreme Court of the United States

NPC SERVICES, INC., EXXON MOBIL CORPORATION, UNITED STATES STEEL CORPORATION, DSM COPOLYMER, INC., SHELL CHEMICAL LP, CROMPTON MANUFACTURING COMPANY, INC., THE DOW CHEMICAL COMPANY, ETHYL CORPORATION, CELENESE AMERICAS CORPORATION, HONEYWELL INTERNATIONAL, INC., ROBERT G. BOLGER, J. W. STREET, and W. L. RAINEY,

Petitioners,

v.

MSOF CORPORATION and JAY PAUL LeBLANC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Can respondents' action filed in state court solely under state law causes of action be removed under the All Writs Act based on a consent decree previously issued by a federal district court to which respondents were not a party, does not addresses respondents' claims, and to which respondents' state action does not pose a threat?

B. Does federal question jurisdiction under CERCLA exist over an action filed by respondents in state court against some non-diverse parties where respondents can obtain complete relief under state law causes of action of trespass, negligence and nuisance for the toxic and/or chemical contamination to respondents' property?

STATEMENT PURSUANT TO RULE 29.6

Respondent, MSOF, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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SUMMARY OF ARGUMENT

This case concerns the principle of federalism, which serves to ensure that the limited jurisdiction of federal courts does not improperly invade the jurisdiction of state courts.

Respondents, MSOF and Jay Paul LeBlanc (collectively "MSOF"), filed this action in state court seeking damages for the contamination of its property from the toxic chemicals stored and released from the waste disposal sites located upstream from MSOF's property. MSOF sought relief and asserted causes of action solely under Louisiana state law. Petitioners (collectively "the NPC Defendants") removed the action from state court asserting that the federal court had jurisdiction over the matter under the All Writs Act, 28 U.S.C. § 1651, and that federal question jurisdiction was present under 42 U.S.C. § 9613(b) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

The NPC Defendants contend that the federal court had jurisdiction over this matter under the All Writs Act because the MSOF action conflicted with a consent decree previously issued in *United States v. Petro-Processors of Louisiana, Inc., et al.*, Civil Action No. 80-358-B, United States District Court, Middle District of Louisiana ("PPI Litigation"). Petitioners' Brief, p. 7. In the PPI Litigation, the United States and other governmental parties filed suit in response to the release of toxic chemicals generated by many of the NPC Defendants, which were stored at waste sites ("PPI waste sites") operated by Petro-Processors of Louisiana, Inc. ("PPI"). On February 16, 1984, the parties to the PPI Litigation entered into a consent decree ("Consent Decree") to resolve the PPI Litigation. *See* Consent Decree, Petitioners'

Appendix, 23a-27a. The Consent Decree set forth a plan to contain and remediate the tons of volatile chemicals stored at PPI waste sites. Consent Decree, Paragraphs 5-6, Petitioners' Appendix, 24a-25a.

Some federal courts have held that the All Writs Act is not an independent source of removal jurisdiction, while others have interpreted the All Writs Act to permit the removal of a state court action when the state action presents a threat to a previously issued federal consent decree. If the All Writs Act is not an independent source of removal jurisdiction, removal of the MSOF action was improper. Even if the All Writs Act can support removal under extraordinary circumstances, the All Writs Act does not support removal of the MSOF action because MSOF's request for monetary damages does not conflict with the CERCLA cleanup of the PPI sites prescribed by the Consent Decree. Further, MSOF was not a party to the Consent Decree, the Consent Decree did not address the claims brought by MSOF in the state court action, and the Consent Decree did not concern the contamination of the MSOF property.

The NPC Defendants assert that MSOF's claims arise under CERCLA, thereby invoking the exclusive jurisdiction of the federal court under 42 U.S.C. § 9613(b). Petitioners' Brief, p. 9. However, MSOF may obtain complete relief under Louisiana state law actions of negligence, nuisance and trespass. MSOF's right to relief does not necessarily turn on the interpretation or application of any federal law. In addition, the MSOF action does not challenge the CERCLA cleanup of the PPI waste sites as MSOF only seeks monetary damages for the toxic contamination of its property and does not seek to alter the CERCLA cleanup. Therefore, federal question jurisdiction is lacking.

The Fifth Circuit held that the MSOF action filed in state court was improperly removed and that the federal district court did not have original jurisdiction under the All Writs Act or CERCLA. Petitioners' Appendix, 1a-12a. This holding is well-grounded in law and the present petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

A. THE FIFTH CIRCUIT PROPERLY HELD THAT REMOVAL OF THIS ACTION FROM STATE COURT WAS NOT WARRANTED UNDER THE ALL WRITS ACT

1. The All Writs Act is not an independent source of federal court jurisdiction

Under 28 U.S.C. § 1441[1], an action may be removed only where the federal district court would have had original jurisdiction over that action. Removal jurisdiction raises significant federalism concerns, *see Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809, 106 S. Ct. 3229, 3233, 92 L. Ed. 2d 650 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S. Ct. 2841,

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1. 28 U.S.C. § 1441(b) states:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

2846, 77 L. Ed. 2d 420 (1983), and federal courts must therefore strictly construe removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941); Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper 14B Fed. Prac. & Proc. Juris. 3D § 3721 at 351-52 (2002).

The All Writs Act provides, in part, that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The plain and unambiguous language of 28 U.S.C. § 1651(a) does not confer original jurisdiction on the district courts. The All Writs Act merely allows federal courts "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction **otherwise obtained**." *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 98 S .Ct. 364, 372, 54 L. Ed. 2d 376 (1977) (emphasis added). As such, the All Writs Act does not enlarge jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 535, 119 S. Ct. 1538, 1542, 1143 L. Ed. 2d 720 (1999) *citing* Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 16 Fed. Prac. & Proc. Juris. 2D § 3932, p. 470 (2d ed. 1996) ("The All Writs Act . . . is not an independent grant of appellate jurisdiction") and 19 J. Moore & G. Pratt, Moore's Federal Practice § 204.02[4] (3d ed. 1998) ("The All Writs Act cannot enlarge a court's jurisdiction").

The Ninth, Tenth, and Eleventh Circuits hold that the All Writs Act does not create an independent source of subject-matter jurisdiction that would expand removal jurisdiction. *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993); *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997); and *Henson*

v. Ciba-Geigy Corp., 261 F.3d 1065, 1070 (11th Cir. 2001), *cert. granted sub nom. Syngenta Crop Protection v. Henson*, 122 S. Ct. 1062 (2002). The Fifth Circuit has also expressed doubt "that All Writs Act removal [is] proper even in the face of extraordinary circumstances." *Texas v. Real Parties in Interest*, 259 F.3d 387, 394 (5th Cir. 2001), *cert. denied sub nom Umphrey v. Texas*, 122 S. Ct. 924 (2002). These concerns are well-placed.

The use of the removal jurisdiction under the All Writs Act has recently received scholarly review and criticism. *See, e.g.*, Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. Rev. 773 (2000). These scholars have questioned the efficacy of the recent discovery and use of removal jurisdiction under the All Writs Act, passed in 1789.

As Professor Hoffman noted: "From 1789 to 1987, no court had ever ruled by reported decision that the All Writs Act could serve as an independent basis for removal." Hoffman, 148 U. Pa. L. Rev., p. 413. Professor Hoffman further states:

> Federal courts are courts of limited jurisdiction because they cannot assume jurisdiction over a particular controversy unless it comes within Article III of the Constitution *and* a specific statute permits them to exercise jurisdiction. However, Congress has never authorized such an expansive grant of jurisdiction to the federal courts through the All Writs Act. Consequently, broadening removal jurisdiction in this fashion expands district court

> original jurisdiction beyond the maximum limits currently authorized by Congress.

Hoffman, 148 U. Pa. L. Rev. 401, pp. 404-405. These observations were echoed by Professor Steinman:

> [C]onsiderations of comity, requiring courts of one jurisdiction to forbear from interfering with courts of another jurisdiction, and of federalism, premised on the notion that federal courts must respect the independent sovereignty of state courts, dictate that the federal courts should not loosely interpret the All Writs Act to permit removal of actions from state court. 'Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts,' unless their injunction is warranted under the [Anti-Injunction Act] and, in that circumstance, injunction rather than removal usually, if not always, should be ordered.

Steinman, 80 B.U. L. Rev. 773, 815-816 [citations omitted]. The plain language and historical use of the All Writs Act support the Eleventh Circuit's position that the All Writs Act is not "jurisdictional caulk" that can fill gaps in federal court authority. *Henson*, 261 F.3d at 1070. To interpret the All Writs Act to confer original jurisdiction on the federal courts would impermissibly expand the subject matter jurisdiction beyond the maximum limits authorized by Congress.

The All Writs Act is not an independent source of federal court jurisdiction and the state court action filed by MSOF against non-diverse defendants under Louisiana state law causes of action is not removable under the All Writs Act.

2. The MSOF action does not conflict with the Consent Decree

The NPC Defendants argue that the All Writs Act provides authority to remove MSOF's state court action to protect the Consent Decree issued in the prior PPI litigation and, in support, cite to cases rendered by the Second, Seventh and Eighth Circuits. Petitioners' Brief, p. 8. However, these courts have relied upon the All Writs Act for removal jurisdiction only in exceptional circumstances, to wit: Relitigation of issues by the same parties to previous federal cases, *e.g. Sable v. General Motors Corp.*, 90 F.3d 171, 174 (6th Cir. 1996)[2] and *Xiong v. Minnesota*, 195 F.3d 424, 427 (8th Cir. 1999); the subsequent litigation affects constitutional rights of parties to existing suits, *e.g. Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 833 (1989); and where issues raised in state court could not be separated from relief ordered in consent decree, *e.g. United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992). None of these circumstances are present here, which distinguishes these cases from the case *sub judice*.

The NPC Defendants removed the MSOF action under the All Writs Act contending that the MSOF action "would (or at least possibly could) conflict" with the Consent Decree. Petitioners' Brief, p. 9. To the contrary, MSOF desires the attainment of the explicit objective of the Consent Decree—the protection of the public, including MSOF and its property, from the release of the toxic substances from the PPI waste

2. In *Sable*, the Sixth Circuit decided that federal jurisdiction existed over plaintiff's state law tort action because an element of the tort claim was defendants' breach of a duty created by federal law. *See Sable*, 90 F.3d at 174. No element of MSOF's state law claims is created by federal law.

sites "by the investigation, development, design and implementation of remedial and long-term monitoring programs for both [the PPI waste] sites . . ." Consent Decree, Paragraph 5, Appendix, 4a. A release of the toxic chemicals stored at the PPI waste sites onto MSOF's property located downstream would constitute a violation of the stated goal of the Consent Decree. The Fifth Circuit agreed stating: "If anything, the plaintiffs' suit is consistent with these objectives [of the Consent Decree], not at odds with them." Petitioners' Appendix, 11a.

In its state court action, MSOF seeks "compensatory damages in an amount to be proven at trial commensurate with the costs of restoration and remediation of [MSOF]'s property" and "exemplary damages." MSOF Petition, Prayer for Relief, Petitioners' Appendix, 33a. The award of even complete relief under Louisiana tort law as sought by MSOF would not frustrate the Consent Decree, as the award of monetary damages to MSOF would not impact or effect the implementation of the remediation plan called for in the Consent Decree. As the Fifth Circuit noted below, "the consent decree certainly does not expressly purport to authorize any contamination of plaintiffs' land or anything else plaintiffs complain of." Petitioners' Appendix, 11a. Therefore, the relief sought by MSOF does not affect, much less threaten, the integrity of the Consent Decree.

Even under the expansive interpretation of the All Writs Act approved in the Second, Seventh and Eighth Circuits, removal of the MSOF action under the All Writs Act is improper in this case because the MSOF action does not pose a threat to the integrity of the Consent Decree. Further, writs are "drastic" remedies which a court should invoke only in "extraordinary situations." *Kerr v. United States District Court*,

426 U.S. 394, 402, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976). Therefore, the Fifth Circuit properly held, removal jurisdiction over this case is not appropriate under the All Writs Act. Petitioners' Appendix, 12a.

3. The MSOF property is not within the CERCLA cleanup area delineated in the Consent Decree

Under the terms of the Consent Decree, the defendant parties to the PPI Litigation agreed to remediate the PPI waste sites (the Brooklawn and Airline Highway sites), which are delineated in the Consent Decree. Consent Decree, Paragraphs 3 and 4, Appendix 3a. MSOF's property is not within the PPI waste sites defined in the Consent Decree. Therefore, the continuing jurisdiction of the district court over the PPI waste sites as set forth in the Consent Decree is limited to the PPI waste sites and does not include the MSOF property. Consent Decree, Paragraph 35, Petitioners' Appendix, 27a. The exercise of removal jurisdiction over the MSOF action under the All Writs Act would improperly extend the limited jurisdiction of the federal court through the Consent Decree to cover the MSOF property, an area outside the PPI waste sites. The Fifth Circuit was right not to countenance such an extension of jurisdiction.

4. MSOF was not party to the Consent Decree

The Consent Decree settled the PPI Litigation as to the parties to that litigation. Claims of non-parties to the Consent Decree concerning the release of the toxic substances stored at the PPI waste sites were expressly preserved and not released by the Consent Decree, which provides: "[i]t is not the purpose of this agreement nor the intention of the parties to release any other persons or entities not parties to this

Consent Decree from any claims or liabilities, the right to pursue which is expressly reserved." Consent Decree, Paragraph 29, Appendix 4a. MSOF was not party to the PPI Litigation or the Consent Decree and MSOF's right to bring these state law claims against the NPC Defendants was not limited or extinguished thereunder, nor are MSOF's claims subject to the federal court's jurisdiction under the Consent Decree.

B. MSOF'S ACTION DOES NOT RAISE A FEDERAL QUESTION

Absent diversity of citizenship, as in this case, federal-question jurisdiction is required, *i.e.* "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal courts have jurisdiction to hear, originally or by removal, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action, or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 2856, 77 L. Ed. 2d 420 (1983). MSOF does not seek relief under any federal law nor does MSOF's right to relief under state law necessarily depend on a substantial question of federal law. Therefore, federal question jurisdiction is lacking over the MSOF action.

1. MSOF may obtain complete relief under Louisiana state law causes of action and federal question jurisdiction does not exist

MSOF's state court petition alleged that toxic chemicals from the PPI waste sites contaminated its land and sought relief solely under negligent and strict liability torts pursuant to Louisiana state law—La. Civ. Code arts. 2315[3], 2317[4], and 667[5], which encompass the doctrines of negligence, trespass and nuisance. MSOF Petition, Paragraph 23, Petitioners' Appendix, page 31a. In its prayer for relief, MSOF seek "compensatory damages in an amount to be proven at trial commensurate with the costs of restoration and remediation of [MSOF]'s property" and "exemplary damages" from the NPC Defendants for their mishandling of hazardous substances. MSOF Petition, Prayer for Relief, Petitioners' Appendix, Page 33a.

It is well settled where a plaintiff has available both a state and a federal cause of action, the plaintiff "may avoid federal jurisdiction by exclusive reliance on state law," as

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3. La. Civ. Code art. 2315 provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

4. La. Civ. Code art. 2317, in pertinent part, provides: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

5. La. Civ. Code art. 667, in pertinent part, provides: "Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

MSOF has done in this case. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987). MSOF has not sought relief under any federal statute or law and has elected to proceed exclusively pursuant to state law.

In *McCastle v. Rollins Environmental Services*, 514 F. Supp. 936 (M.D. La. 1981), plaintiffs brought a class action in state court against a hazardous waste disposal facility claiming that defendant had released chemical fumes and odors, which constituted a nuisance under Louisiana state law. The plaintiffs prayed for monetary damages and for injunctive relief, including closure of the facility. The defendant claimed that plaintiffs alleged a cause of action under the Resource Conservation and Recovery Act (RCRA) and, therefore, was founded upon a claim "arising under the Constitution, treaties or laws of the United States" which permitted removal of the action to federal court.

The court found no basis for removal jurisdiction of the plaintiffs' action brought under Louisiana state law, stating:

> Louisiana has an existing comprehensive and sophisticated body of law relating to actions which result in injury or damage to one's neighbors. The Louisiana Civil Code provides a complete set of rules governing liability for actions between neighbors. Plaintiffs and defendant may obtain complete relief under state law in state court. There is thus a forum available for resolution of this dispute other than federal common law, applied by a federal district court.

> As to overriding federal concern, the fact that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 saves to plaintiffs their state law remedies for injury or damage caused by air pollution is an indication that the Congress has not concluded that there is an overriding federal concern in this area.

McCastle, 514 F. Supp. at 941.

Here, as in *McCastle*, MSOF has not sought relief under CERCLA, RCRA, or any other federal law. Under Louisiana state law, "[t]he *cost* of cleanup or removal of offending substances is an *element of damages* and, thus, part of the relief that may be obtained *if the cause of action is proved.*" *Mouton v. State*, 525 So. 2d 1136, 1143 (La. App. 1st Cir. 1988), *writ denied*, 526 So. 2d 1112 (La. 1988) (emphasis original). As the *Mouton* court makes clear, MSOF is entitled to the cost of cleanup and/or remediation as an element of monetary damages if MSOF establishes the causes of action under La. Civ. Code arts. 2315, 2317, and 667. Therefore, no essential element of the MSOF's causes of action arises under federal law. The Fifth Circuit followed the clear holding of *Mouton* and held that MSOF can obtain complete relief from the NPC Defendants under the Louisiana causes of action pled in its complaint. Petitioners' Appendix, 6a, *citing Mouton*, 525 So. 2d at 1143; La. Civ. Code arts. 2315, 2317, and 667.

As the Fifth Circuit properly noted, the only reference to federal law in the MSOF petition is an allegation that the PPI facility was maintained in violation of federal regulations *as well as* in violation of state and local regulations. Petitioners' Appendix, 6a. MSOF's allegation that the NPC

Defendants violated unenumerated federal regulations statutes does not constitute a request for a CERCLA remedy to provide basis for federal question jurisdiction, *e.g. Gray v. Murphy Oil USA, Inc.*, 874 F. Supp. 748, 755 (S.D. Miss. 1994); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 918 (5th Cir. 2001). "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813, 106 S. Ct. 3229, 3234, 92 L. Ed. 2d 650 (1986). Therefore, the Fifth Circuit properly held that MSOF's claims do not necessarily turn on an application or interpretation of CERCLA and that federal question jurisdiction does not exist over this matter. Petitioners' Appendix, 9a.

To support their plea of federal question jurisdiction, the NPC Defendants have simply recharacterized MSOF's state law claims to be CERCLA claims. However, the "artful pleading" doctrine cannot be invoked by party attempting to justify removal on the basis of facts not alleged in the complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397, 107 S. Ct. 2425, 2432, 96 L. Ed. 2d 318 (1987). To hold otherwise would convert all state law causes of action concerning environmental or toxic torts into CERCLA claims despite the explicit terms and policy of CERCLA to the contrary.

2. CERCLA does not preempt state tort law relating to toxic contamination

The NPC Defendants argue that MSOF's claims arise under CERCLA and are subject to the exclusive jurisdiction of CERCLA under 42 U.S.C. § 9613(b)[6]. Petitioners' Brief, p. 9. This argument was properly rejected by the Fifth Circuit based upon the general savings clauses of CERCLA itself: "In enacting CERCLA, Congress expressly disclaimed an intent to preempt state tort liability for the release of hazardous substances. CERCLA contains a general saving clause and several section-specific saving clauses." Petitioners' Appendix, 6a-7a, *citing* to 42 U.S.C. § 9652(d)[7] and 42 U.S.C. § 9607(j)[8]. In addition,

6. 42 U.S.C. § 9613(b) provides: "the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy."

7. 42 U.S.C. § 9652(d) provides:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

8. 42 U.S.C. § 9607(j) provides:

> Recovery by any person . . . for response costs or damages resulting from a federally permitted release shall

(Cont'd)

liability under state law[9] and state tort law[10] concerning the release of hazardous substances are not affected by CERCLA. Therefore, Congress has expressed the clear intent that state law causes of action concerning toxic torts shall remain in effect.

Several circuit courts have held that Congress has made no attempt to pre-empt the field in areas of CERCLA liability, *e.g. ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1114-1115 (9th Cir. 2000) ("CERCLA does not completely occupy the field of environmental regulation. Congress expressly declared that it had no intent to do so. . . . At best, CERCLA may provide a conflict preemption defense to [plaintiff's] state law claims."); *Bedford Affiliates v. Sills*, 156 F.3d 416, 426-427 (2d Cir. 1998) ("We conclude it was not part of the legislative purpose that CERCLA be a

(Cont'd)

> be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

9. 42 U.S.C. § 9614(a) provides: "Nothing in this Act shall be construed or interpreted as preempting, any state from imposing any additional liability or requirement with respect to the release of hazardous substances within each state."

10. 42 U.S.C. § 9672 provides: "Nothing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State."

comprehensive regulatory scheme occupying the entire field of hazardous wastes, nor does CERCLA prevent the states from enacting laws to supplement federal measures relating to the cleanup of such wastes."); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) (purpose of 42 U.S.C. § 9652(d) "is to preserve to victims of toxic wastes the other remedies they may have under federal and state law") and *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991) (In enacting CERCLA, Congress did not explicitly preempt all state law, nor did it create a comprehensive scheme of regulation leaving no room for supplementation.). Accordingly, CERCLA does not preempt MSOF's claims under Louisiana state law.

3. MSOF's action is not a challenge to a CERCLA cleanup

The NPC Defendants assert that MSOF has challenged the CERCLA cleanup of the PPI sites prescribed in the Consent Decree and, thus, is subject to the exclusive jurisdiction of the federal court under 42 U.S.C. § 9613(b). Petitioners' Brief, p. 10. In support, the NPC Defendants cite to a line of Ninth Circuit caselaw. *Id.* However, the Ninth Circuit has "found actions to challenge CERCLA cleanups where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to alter the method and order of cleanup. *ARCO Environmental Remediation*, 213 F.3d at 1115 [citations omitted]. MSOF does not seek to alter cleanup requirements or environmental standards, nor does MSOF seek to terminate or delay the cleanup of the PPI sites. Therefore, the MSOF action does not constitute a "challenge" to the CERCLA cleanup of the PPI sites, even under analysis of *ARCO* and the line of Ninth Circuit cases cited by the NPC Defendants. As the Fifth Circuit found: "If anything, the plaintiffs' suit is consistent with these objectives [of the Consent Decree], not at odds with them." Petitioners' Appendix, 11a.

The NPC Defendants contend that MSOF's claims arise under federal law because the scope of what is authorized under CERCLA and the Consent Decree may limit the defendants' obligations to MSOF. It is well established there is no federal question jurisdiction when "federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if [the plaintiff] has made out a valid claim for relief under state law." *Franchise Tax Board*, 103 S. Ct. at 2848. The federal question on which jurisdiction is based must be invoked as part of the plaintiff's claim rather than in anticipation of a defense. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998). Therefore, the "artful pleading" doctrine is inapplicable to MSOF's state court action.

The Fifth Circuit properly held below "that neither CERCLA nor the mere existence of the federal consent decree creates federal 'arising under' jurisdiction in this case." Petitioners' Appendix, 9a.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari filed by the NPC Defendants.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM CONSENT DECREE, DATED FEBRUARY 6, 1984 ISSUED IN *UNITED STATES v. PETRO-PROCESSORS OF LOUISIANA, INC., et al.*, CIVIL ACTION NO. 80-358-B, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 80-358-B

UNITED STATES OF AMERICA,

Plaintiff

VERSUS

PETRO PROCESSORS OF LOUISIANA, INC.; UNITED STATES STEEL CORP.; COPOLYMER RUBBER AND CHEMICAL CORP.; UNIROYAL, INC.; ETHYL CORP.; DOW CHEMICAL CO.; SHELL OIL COMPANY; AMERICAN HOECHST CORP.; EXXON CORP.; EXXON CHEMICAL CO.; ALLIED CHEMICAL CORP.; RUBICON CHEMICALS CORP.

Defendants

AND

STATE OF LOUISIANA
CITY OF BATON ROUGE, AND
PARISH OF EAST BATON ROUGE,

Intervenors

Appendix

CONSENT DECREE

Plaintiffs, United States of America (United States), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), Intervenor Plaintiffs, State of Louisiana (Louisiana) and the City of Baton Rouge (Baton Rouge), hereafter collectively referred to as "Plaintiffs," and certain of the Defendants, United States Steel Corporation, Copolymer Rubber and Chemical Corporation, Uniroyal, Inc., The Dow Chemical Co., Ethyl Corp., Shell Oil Company, American Hoechst Corp., Exxon Corporation, Allied Corporation, and Rubicon Chemicals, Inc., (collectively "Industry Defendants") have each agreed to the making and entry of this Consent Decree ("Decree") prior to completion of trial and without any admission of liability or fault as to any allegation or matter arising out of the pleadings of any party.

Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED:

* * *

Appendix

3.

The Brooklawn site is located just south of Brooklawn Road, about 5 miles north of Baton Rouge, and about 2 miles west of Highway 61, between Brooklawn Road and Bayou Baton Rouge, in East Baton Rouge Parish, Louisiana. The Brooklawn site consists of four generally identifiable areas of waste disposal and contamination: the Bluff Area, in the north-northeast portion of the site; the Cypress Swamp and Bayou Area and that area in the west-southwest portion of the site which includes contaminated sediments and soils in Bayou Baton Rouge and other property described in Attachment "A"; the Upper and Lower Lagoons Area in the south-central area of the site; and the Batture Area in the east portion of the site. The Brooklawn site, as used herein, shall also include any property used for construction of a landfill for solidified wastes pursuant to Paragraph 6 of this Decree.

4.

The Scenic Highway site is located about 5 miles from Baton Rouge, just west of Highway 61 and the Louisiana and Arkansas Railway right of way, about one mile north of the intersection of Highway 61 with Brooklawn Road, in East Baton Rouge Parish, Louisiana. The Scenic Highway site consists of two generally identifiable areas of waste disposal and contamination: the Bluff Area, the primary area of disposal; and the Batture Area, a relatively small area of waste burial to the west of the Bluff Area. The Scenic Highway site, as used herein, shall also include any property used for construction of a landfill for solidified waste pursuant to Paragraph 6 of this Decree.

Appendix

5.

The objectives of the parties, through entry of this Decree, are to protect public health and the environment from releases of hazardous wastes, solid wastes, hazardous substances and pollutants and contaminants (hereinafter collectively "wastes") from the Brooklawn and Scenic Highway sites, by the investigation, development, design and implementation of remedial and long-term monitoring programs for both sites by the Industry Defendants. The remedial programs shall employ sound scientific, engineering and construction practices.

* * *

29.

It is not the purpose of this agreement nor the intention of the parties to release any other persons or entities not parties to this Consent Decree from any claims or liabilities, the right to pursue which is expressly reserved. Industry Defendants reserve any rights they may have to intervene in any action brought by the Plaintiffs to recover funds expended by Industry Defendants for closure pursuant to this Decree.

* * *

Dated and entered this 16 day of February, 1984.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE